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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANN MARIE BIELICKI et al.,

Plaintiffs and Appellants,

v.

MONEX DEPOSIT COMPANY et al.,

Defendants and Respondents.

G033881

(Super. Ct. No. 00CC15244)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jonathan H. Cannon, Judge. Affirmed.

McInerney & Jones, Kevin J. McInerney, Kelly McInerney and Charles A. Jones, for Plaintiffs and Appellants.

Stradling Yocca Carlson & Rauth, Todd E. Gordinier and Jason H. Anderson, for Defendants and Respondents.

This is an appeal from an order that denied a class certification motion. The plaintiffs are Ann Marie Bielicki, Georgene Bielicki, and John Davino, individually and on behalf of all others similarly situated (collectively, Bielicki unless otherwise

indicated). Defendants are Monex Deposit Company, Monex Credit Company, Comco Management Corporation, Metco Management Corporation, Louis E. Carabini, and Michael A. Carabini (collectively, Monex unless otherwise indicated). Bielicki argues the trial court applied improper criteria and made erroneous legal assumptions in denying certification. We disagree and affirm.

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Bielicki sued Monex for violation of the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.), violation of the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.), fraudulent concealment, civil conspiracy, and negligent supervision. According to the complaint, Monex sells precious metals to the public through unlicensed in-house sales representatives who refer to themselves as brokers. It offers customers the opportunity to open a margin account, called an Atlas account, which is the focus of the complaint.

One series of allegations in the complaint is that Monex brokers fraudulently induced customers to open Atlas accounts through misrepresentations and omissions that minimize the risks of investing in volatile precious metals through a margin account. The misrepresentations are found in brochures, print and television advertisements, a web site, and documents signed by customers. The affirmative statements are not the issue here, so we say no more about them.

The omissions are that Monex never told prospective customers that: (1) 95 percent of those who open an Atlas account lose money; (2) margin calls are likely within a few months absent a market upswing, because the equity is rapidly eroded by commissions, interest, other charges, and the repurchase price Monex offers if a customer needs to liquidate a portion of the account; and (3) Monex offered brokers special payments (called spiffs) and held monthly contests that encouraged the brokers to steer customers to particular metals or coins without considering if these investments were suitable for the customer.

The named plaintiffs each allege they were induced to open a margin account because one or more of these facts were concealed from them, and as a result each lost a substantial amount of money.

The fraudulent inducement theory is reflected in two of the causes of action. The UCL cause of action alleges the omissions (along with numerous misrepresentations and other acts) constitute fraudulent business practices. Restitution, disgorgement of profits, an injunction, and a receiver are sought. The fraudulent concealment cause of action alleges Monex had a duty to disclose this information by virtue of its superior knowledge and because it was impossible to make sure these and other statements made to prospective customers were accurate. It alleges Monex intentionally concealed the information, it was material, and Bielicki would not have invested with the company had she known the true facts. Compensatory and punitive damages are sought.

The certification motion envisioned a class consisting of all persons who opened an Atlas account with Monex since December 20, 1996. Bielicki argued there were seven common issues of law or fact that should be certified. One was whether Monex “conceal[ed] material facts.”<sup>1</sup> In a reply brief, Bielicki alternatively sought certification of the UCL fraudulent business practices claim.

Evidence was offered to support the allegations of customer losses, margin calls, and broker incentives. Three former Monex brokers submitted declarations in which each said he or she estimated 5 percent of the customers they knew made money or broke even. A fourth said the same thing at a deposition. A Monex sales manager testified at a deposition that a customer opening a margin account with 20 percent cash

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<sup>1</sup> The other issues for which class certification was sought were: Whether Monex committed fraud in offering or maintaining an Atlas account; whether Monex engaged in false advertising; whether the Atlas account agreement contained unconscionable provisions; whether Atlas account holders were consumers as defined in Civil Code section 1761, subdivision (d); whether plaintiffs are entitled to punitive damages; and whether plaintiffs are entitled to injunctive or other equitable relief.

would face a margin call in 10 months if there was no market increase. He explained that commissions, fees, monthly interest, and service charges would bring the equity down to 12 percent, the level at which Monex demanded the deposit of additional funds. The existence of monthly sales incentives to promote certain products was attested to by a memorandum describing one, a “platinum promotion,” and by declarations from eight former brokers, all of whom said these incentives were not revealed to customers.

Bielicki explained her trial strategy which avoided the need to examine each plaintiff’s trading history. She intended to offer a statistical compilation of monthly account statements to show investors historically lost money, documentary evidence of standard practices of contests and incentives that accounted for the losses, deposition testimony of Monex’s principals that they did not know Atlas investors suffered losses, and testimony from brokers and a representative sample of investors that prospects were never told of the loss history.

Monex’s opposition to certification of the concealment issue argued that neither the unfair competition claim, nor the one for fraudulent concealment, warranted class status. It filed voluminous objections to Bielicki’s evidence.

On the question of customer losses, Monex disputed Bielicki’s evidence with supplemental declarations from two of the former brokers she had relied on. Each said they really did not know whether Monex made money from its customers, and customer losses were the result of market movements. One backpedaled, saying his estimate that only 5 percent of customers made money was based only on his recollection of events during 15 months he worked for Monex. He said he had not reviewed any documents to verify that recollection, and he did not know how accounts performed at other times.

In response to the allegations about incentives, Monex offered declarations from some of Bielicki’s declarants, and other former brokers, who said they always acted

in the customer's best interests and never made recommendations based on promotions or incentives. Monex argued that whatever happened was individual to each customer.

Monex also argued the nondisclosure claim involved individual transactions not susceptible to treatment as a class. It contended no single sales pitch had been shown, each plaintiff bought or sold for different reasons, and each claimed losses for different reasons. What was allegedly concealed from each can only be judged based on what representations and disclosures were made to a particular individual. Further, Monex argued any duty of disclosure was individual to each plaintiff, as was the materiality of the facts omitted and justifiable reliance by each plaintiff.

Monex further took issue with the adequacy of the named plaintiffs as class representatives. Essentially, it repeated the argument that all claims were individual – each of the named plaintiffs had different reasons for buying and selling, and claimed different losses, and the same would be true of each member of the class sought to be certified.

The trial court issued a tentative ruling denying the motion. It did not rule separately on the evidentiary objections. Instead, it stated the objections had been reviewed and it would only consider the admissible evidence, relying on *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410.

On the merits, the trial court found “common issues of law and fact do not predominate; nor are the claims of the individual representatives typical.” It said the evidence, including the declarations of the named plaintiffs, showed liability and damages would be based on individual transactions, and “[t]here is no evidence of any ‘universal’ conduct or misrepresentations.” That is, each purported class member had different dealings with Monex, engaged in different transactions, relied for different reasons, and suffered different damages. For the same reason, the court held the class representatives’ claims could not be considered typical of those of other members of the class.

At oral argument before us, Bielicki pointed out that her fraudulent inducement theory did not depend on individual dealings, transactions, or damages. She argued the claim was the concealment occurred prior to opening an account, the same facts were concealed from all potential investors, and materiality and reliance can be inferred on a class-wide basis in a concealment case. Bielicki also contended that her unfair competition claim did not require proof that anyone was deceived, relied, or sustained damages. As a fallback, Bielicki asked the court to certify the single question whether 95 percent of Monex investors lost money. The trial judge adopted the tentative ruling as his decision, without comment.

## I

Bielicki argues the trial court used improper criteria and made erroneous legal assumptions in denying class certification because it applied standards for proving misrepresentation, not concealment, and it did not explain why the concealment claim was not certified. We cannot agree.

A class action may be brought “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .” (Code Civ. Proc., § 382.) It must be shown there is “an ascertainable class and a well-defined community of interest among the class members.” (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) The latter requires consideration of whether: (1) common questions of law or fact predominate; (2) class representatives have claims or defenses typical of the class; and (3) class representatives can adequately represent the class. (*Ibid.*)

The certification question is procedural and does not inquire whether the action is meritorious. It calls on the trial court to determine “whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be

advantageous to the judicial process and to the litigants.’ [Citations.]” (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 326.)

We review for abuse of discretion. The trial court’s ruling must be sustained if supported by substantial evidence, unless based on improper criteria or erroneous legal assumptions. (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at pp. 326-327.) Any valid reason for denying certification will suffice and requires affirmance. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436.)

Here, the trial court stated common questions of fact do not predominate, and that is a valid reason for denying certification. That one question out of seven may be suitable for class treatment does not show an abuse of discretion in denying the motion. The issue is not whether the trial court might have certified that question, but rather whether the evidence supports the order made. It does. Bielicki sought certification of seven questions, and she does not challenge the denial as to six of them. On the numbers alone, the six conceded questions are substantial evidence that separate issues predominate. Moreover, Bielicki makes no attempt to demonstrate why it was unreasonable to conclude the individual claims predominate, and that fails to carry the appellant’s burden to affirmatively demonstrate error.

Bielicki argues *Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th 319 holds the trial court’s ruling on a certification motion must discuss plaintiff’s theory of recovery, compare the benefits of class treatment with individual adjudication, and consider the policy implications of allowing a class action to go forward. She is mistaken, having taken statements out of context. We consider each point in turn.

*Sav-On* was an appeal from an order certifying a class action, and the issue was whether the trial court abused its discretion in concluding common issues predominated. The court began its analysis by considering whether the plaintiff’s theory of recovery was likely to be amenable to class treatment (*Sav-On Drug Stores, Inc. v.*

*Superior Court, supra*, 34 Cal.4th at p. 327), but it never said, or suggested, that a certification order must expressly discuss this issue.

Later in the opinion, the court addressed a misstatement of the law made below. It said the rule is not that class certification must be denied if each member's right to recover turns on facts particular to that individual's case. Rather, "the established legal standard for commonality . . . is comparative" (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 339, fn. omitted.) A footnote explained the standard requires comparison of the costs and benefits of deciding plaintiff's claims in a class action versus individually. (*Id.* at p. 339, fn. 10.) But this statement of the law does not go to what must be contained in the trial court's decision, only that it must make the comparison. Here, the trial court did just that when it found common issues do not predominate. This implies the trial court weighed the common and separate issues and, on balance, found the costs of class treatment outweighed its benefits. We do not understand anything more to be required.

On the matter of public policy, *Sav-On* ends with a discussion of why "sound public policy considerations buttress our conclusion." (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 340.) But here again, the court did not say trial court's must do the same, nor intimate the failure to do so requires reversal. So we find nothing in *Sav-On* that indicates the reasons given for denying certification are insufficient.

Bielicki also argues the trial court assumed universal conduct is required to certify a class, an incorrect legal assumption. She is correct that class certification does not require members' claim be identical or uniform (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 338), but wrong that reversible error is shown. It is true that one of the reasons for denying certification here was no evidence of universal conduct had been offered. But the court also found that common issues did not predominate, a proper reason to deny certification. Since "[a]ny vaild pertinent reason

stated will be sufficient to uphold the order.’ [Citation],” (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at p. 436), and a valid reason was stated, any error was harmless. So the order denying certification was not based on improper criteria or erroneous legal assumptions.

## II

Bielicki argues the trial court should have ruled individually on Monex’s objections to her evidence, no matter the burden, and it was improper to use the approach authorized in *Biljac Associates v. First Interstate Bank*, *supra*, 218 Cal.App.3d 1410. But this is an issue we need not reach. Monex does not challenge the admissibility of any evidence on this appeal, so there is no issue here to decide.

Since the order denying certification was within the discretion of the trial court, it is affirmed. Respondent is entitled to costs on appeal.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.